

The Pinochet Cases: General, President, Defendant

Philippa Webb and Yasmin Liberman

I. Background

A. The Coup

As with many dictators, General Augusto Pinochet entered the world stage through a coup d'état. On 11 September 1973, the democratically elected government of President Salvador Allende was violently overthrown by the Chilean military. The coup was led by General Pinochet as Commander-in-Chief. The world watched these events unfold on television, as British-made Hawker Hunter jets bombed the presidential palace, *La Moneda*, with President Allende still inside.

Following the fall of *La Moneda*, the armed forces, under the direction of a military junta with Pinochet at the helm, assumed total control of Chile. Initially, it was believed that President Allende had been murdered by military forces. However, a forensic investigation by Chilean experts in 2011 revealed that in fact Allende had committed suicide with an AK-47 rifle, which had been a gift from Fidel Castro.¹

Notably, the coup that ousted democracy from Chile was instigated under the pretext of a fight against Communism. As Chile's first socialist president, Allende had ambitious plans to take Chile on the "road to socialism."² After taking office, he moved quickly by nationalizing copper mines and other industries, conducting land reform and increasing government expenditure on social welfare programs.³ These policies were divisive and ultimately alienated a significant proportion of the population, the military and the private sector.⁴

Many of Pinochet's most ardent supporters – those who call themselves '*Pinochetistas*' – argued that the military coup was necessary. According to Pinochet's eldest daughter Lucía Pinochet, the coup was needed in order to prevent Chile from turning into "another Cuba."⁵ She believed that if the armed forces had not stepped in, a bloody civil war would have been inevitable.

Concerns about Allende were also felt beyond Chile, as his socialist experiment stirred up angst in Washington DC. Notoriously, from the moment that Allende was elected President of Chile in 1970, the Central Intelligence Agency (CIA) under United States (US) President Richard Nixon waged a secret campaign of destabilisation against his government. According to declassified US government documents, Nixon's plan was to make Chile ungovernable

¹ Alexei Barrionuevo and Pascale Bonnefoy, 'Allende's Death was a Suicide, an Autopsy Concludes' *The New York Times* (19 July 2011) <<https://www.nytimes.com/2011/07/20/world/americas/20allende.html>> accessed 1 June 2022; Michael Guerrin, 'The Story of the 'Last Photo' of Salvador Allende, the Chilean President who Killed Himself in the 1973 Coup' *Le Monde* (11 September 2023) <https://www.lemonde.fr/en/history/article/2023/09/11/the-story-of-the-last-photo-of-salvador-allende-the-chilean-president-who-killed-himself-in-the-1973-coup_6132828_157.html> accessed 27 October 2023.

² Jon Lee Anderson, 'The Dictator' *The New Yorker* (11 October 1998) <<https://www.newyorker.com/magazine/1998/10/19/the-dictator-2>> accessed 5 June 2022.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

under Allende, to provoke social chaos and to ultimately bring about a military coup.⁶ One method of doing so was via economic sabotage as conveyed by Richard Helms, the Director of the CIA at the time: “make the economy scream.”⁷ The Nixon Government also funnelled money and arms to right wing paramilitary groups and facilitated press disinformation in Chile throughout this period.

According to journalist John Dinges, the Nixon Administration wanted Allende to fail because, “they were very afraid that the socialist experiment would be successful [in Chile]” and that this would have a ripple effect throughout Latin America.⁸ When the time came of the actual coup, while the United States did not directly participate, Washington was not in opposition to a military takeover.

B. Abuses under the Pinochet Regime

The overthrow of Allende’s government paved the way for a systematic campaign of repression and terror against various groups in Chile, which continued throughout Pinochet’s 17-year-long dictatorship. On the day of the coup, the military rounded up thousands of people and herded them at gunpoint into the National Stadium in Santiago. Out of sight, these ordinary Chileans who were suspected subversives of the regime were detained, tortured and murdered.⁹

This reign of terror was mostly carried out by agents of the National Directorate of Intelligence (DINA), which struck out against anyone suspected of being an enemy of the new Chile. All evidence of abuse was concealed as bodies were dumped in mine shafts, unmarked graves and even dropped from helicopters into the Pacific Ocean.¹⁰ According to various official commissions, the total number of victims of the dictatorship was 40,175 people, with over 1,000 still missing today.¹¹ The Valech Commission, which heard testimony from more than 30,0000 people, established that firing squads, systematic torture, deprivation of liberty, and human rights violations had been a “state policy” during the Pinochet years.¹²

Enforced Disappearance

The Pinochet government was particularly known for the practice of enforced disappearance. As suggested by a journalist Jon Lee Anderson, Pinochet can probably be credited with

⁶ Lee Anderson, ‘The Dictator’ (n 2).

⁷ Peter Kornbluh, ‘Extreme Option: Overthrow Allende’ (2020) National Security Archive <<https://nsarchive.gwu.edu/briefing-book/chile/2020-09-15/extreme-option-overthrow-allende>> accessed 10 June 2022.

⁸ Sarah Gilbert, ‘The Other 9/11’ *SBS* (11 September 2013) <<https://www.sbs.com.au/theother911/>> accessed 10 June 2022.

⁹ David Waldstein, ‘In Chile’s National Stadium, Dark Past Shadows Copa America Matches’ *The New York Times* (17 June 2015) <<https://www.nytimes.com/2015/06/19/sports/soccer/in-chiles-national-stadium-dark-past-shadows-copa-america-matches.html>> accessed 4 June 2022; Jon Lee Anderson, ‘The Dictator’ *The New Yorker* (11 October 1998) <<https://www.newyorker.com/magazine/1998/10/19/the-dictator-2>> accessed 5 June 2022.

¹⁰ Lee Anderson, ‘The Dictator’ (n 2).

¹¹ Ivan Alvarado and Natalia A. Ramos Miranda, ‘Chile Political Prisoners Reclaim Torture Sites to Preserve Coup Memory’ *Reuters* (9 September 2023) <<https://www.reuters.com/world/americas/chile-political-prisoners-reclaim-torture-sites-preserve-coup-memory-2023-09-09/>> accessed 14 October 2023.

¹² *Ibid.*

adding *los desaparecidos* – ‘the disappeared’ – to the modern lexicon.¹³ Enforced disappearance involves the kidnapping of individuals by undercover agents from their homes or the street and then killing them, often after prolonged incommunicado detention and torture.¹⁴ Victims’ bodies are then disposed of in clandestine locations and family members are never notified of death or the whereabouts of the victim. When practiced in a systematic manner or on a massive scale, forced disappearance constitutes a crime against humanity.¹⁵

Unfortunately, the Chilean courts obstructed attempts to investigate these disappearances at the time. According to Roberto Garretón, a lawyer who led judicial investigations of the Vicaría de la Solidaridad during the Pinochet dictatorship, when presented with indisputable evidence of disappearance, the courts would ultimately deny the existence of the person: “that man was never born.”¹⁶ Garretón lamented that the courts denied everything and therefore, “we were never able to separate them from the official lie they were endorsing, that they had made their own.”¹⁷

Operation Condor

In addition, the Pinochet Government spearheaded a cross-border conspiracy known as ‘Operation Condor’. This was a collaborative agreement between the governments of Argentina, Bolivia, Brazil, Chile, Paraguay and Uruguay that provided for the sharing of information, trading of prisoners and orchestration of assassinations.¹⁸ This covert reign of terror targeted suspected communists, leftist intellectuals and supposed subversive individuals.¹⁹ For example, one high-profile assassination was that of Allende’s former Foreign Secretary Orlando Letelier and his American secretary Ronnie Moffitt, who were blown up by a car bomb in Washington DC in 1976.²⁰ The former director of DINA, General Manuel Contreras Sepúlveda, was eventually put on trial and sentenced to seven years in prison for the Washington assassination. He declared before the Supreme Court of Chile that he was carrying out the orders of Pinochet and “informed him daily” about DINA’s activities.²¹

Measures for Self-Protection

While Chile did eventually transition from dictatorship to democracy beginning in 1990, this process did not provide for justice for victims of the Pinochet regime. In part, this was because Pinochet had implemented measures of self-protection before conceding power.

¹³ Lee Anderson, ‘The Dictator’ (n 2).

¹⁴ UN Working Group on Enforced or Involuntary Disappearances, ‘About Enforced Disappearance’ <<https://www.ohchr.org/en/special-procedures/wg-disappearances/about-enforced-disappearance>>.

¹⁵ International Convention for the Protection of All Persons from Enforced Disappearance, Article 5 (entered into force 23 December 2010).

¹⁶ See the testimony of Roberto Garretón in Patricio Guzmán’s documentary *The Pinochet Case* (2002) at 11.34 minutes.

¹⁷ Ibid.

¹⁸ International Commission of Jurists, ‘Crimes against Humanity - Pinochet Faces Justice’ (July 1999) 17 <<https://www.icj.org/wp-content/uploads/1999/07/Chile-Pinochet-fact-finding-mission-report-1999-eng.pdf>> accessed 2 June 2022.

¹⁹ Karen DeYoung et al., ‘This was Not an Accident. This was a Bomb’ *Washington Post* (20 September 2016) <<https://www.washingtonpost.com/sf/national/2016/09/20/this-was-not-an-accident-this-was-a-bomb/>> accessed 26 June 2022.

²⁰ This led to, among other things, a famous US case on the territorial tort exception to State immunity: *Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980).

²¹ International Commission of Jurists, ‘Crimes against Humanity – Pinochet Faces Justice’ (n 18), 17.

These included a 1978 Amnesty Law and the creation of ‘senators for life’ in the Chilean Senate,²² which provided Pinochet and several other military officials with immunity from domestic prosecution. Thus, the road towards accountability looked long and had to begin outside of Chile.

C. Investigations in Spain

The legal background of the Pinochet Cases began in Spain, where significant investigations were being conducted by various groups into abuses committed during the Pinochet era. In 1996, an association of Spanish prosecutors acting in their private capacity filed criminal charges of genocide and terrorism against former military leaders in both Argentina and Chile.²³

Following this, the Argentine and Chilean cases were taken on by two Spanish magistrates – Baltasar Garzón and Manuel García Castellón – respectively, who conducted a meticulous investigation over the course of two years.²⁴ Both magistrates heard volumes of witness testimony and documentary evidence presented in separate courtrooms of the *Audiencia Nacional*, a special court sitting in Madrid with jurisdiction over international crimes.

At the time of investigation, Spanish law recognised universal jurisdiction for criminal offences and codified international crimes – including genocide, torture and terrorism – in its domestic statutes.²⁵ Furthermore, as originally filed, the complaints for both Argentina and Chile named only Spanish citizens as victims. They therefore seem to have been grounded in the criminal jurisdictional principle of passive personality, which is based on the nationality of the victim.²⁶ Accordingly, Spanish jurisdiction was founded on the idea that States have a duty to protect their citizens wherever they may be.

D. International Warrants and Arrest

In what turned out to be an accurate premonition, General Pinochet told the *New Yorker* in early October 1998 that, “history teaches you that dictators never end up well.”²⁷ Only a few weeks later, on 16 October 1998, the 82-year-old former dictator was arrested in at London Bridge hospital while recovering from back surgery.²⁸

The arrest was carried out on the basis of two international arrest warrants issued by Judge Garzón, who sought Pinochet’s extradition to Spain to face charges of genocide, terrorism and torture. It was of considerable assistance to Garzón that both Spain and the UK had ratified the 1957 European Convention on Extradition. The Convention provides for judicial cooperation with respect to the transfer of accused persons between European countries.²⁹

²² Decree 2191 of April 1978.

²³ Richard J. Wilson, ‘Prosecuting Pinochet: International Crimes in Spanish Domestic Law (1999) 21(4) Human Rights Quarterly, 933-34 <<https://www.jstor.org/stable/762753>> accessed 1 July 2022.

²⁴ *Ibid*, 932.

²⁵ Judicial Power Organization Act No. 6/1985, Article 23.4.

²⁶ Wilson, ‘Prosecuting Pinochet’ (n 23), 951.

²⁷ Lee Anderson, ‘The Dictator’ (n 2).

²⁸ David Connett, John Hooper and Peter Beaumont, ‘Pinochet Arrested in London’ *The Guardian* (17 October 1998) <<https://www.theguardian.com/world/1998/oct/18/pinochet.chile>> accessed 27 October 2023.

²⁹ European Convention on Extradition 1957, Article 1.

Following the arrest, those in the Pinochet camp immediately claimed that Pinochet was immune from arrest and prosecution. As reported in the *Sunday Mirror*, Chile's Ambassador to London at the time, Mario Artaza, said that he would be seeking Pinochet's release: "what we must do is make clear that Mr Pinochet is a senator, who travels with a diplomatic passport."³⁰ Yet in the months following the arrest, three more states – Switzerland, Belgium and France – filed requests for Pinochet's extradition.³¹ At the very least, these further extradition requests confirmed that a strong case existed against Pinochet and that a movement for accountability was growing.

Pinochet was placed under provisional house arrest at a luxury estate in Wentworth, Surrey where a neighbour complained, "It's a bit like having Adolf Hitler move in next door."³²

And so began a 17-month legal battle to hold the former dictator accountable for the crimes of his regime.

E. Politics of the Arrest

In addition to questions around immunity, Pinochet's arrest was also a subject of considerable political sensitivity. The arrest raised an important political question about the appropriateness of interfering in the domestic affairs of states undergoing delicate transitions from authoritarianism to democracy. This was a primary concern of Chilean Ambassador Mario Artaza, who publicly proclaimed, "We are not here to protect the dictator of yesterday, we are here to protect and defend our transition to democracy."³³

Pinochet's arrest was also complex as it forced Chile as a nation to re-examine its convulsive past that its leaders may have preferred to put to rest. Transitions from authoritarianism to democracy are challenging for most nations, but it was particularly challenging in Chile where "historical memory is contentious, tarnished, and unstable in its resolution."³⁴

The arrest also put Britain in a difficult diplomatic position. On the one hand, Chile had been a long-time friend, active trade partner and a valued ally of Britain during the 1982 Falklands War. On the other hand, any attempt by Britain to rid itself of the Pinochet case would have run counter to the commitment of Prime Minister Tony Blair's government to an 'ethical' foreign policy.³⁵ This diplomatic sensitivity may explain why the British Home Secretary Jack Straw was careful to insist that the Pinochet matter was ultimately one for the courts, and not for politicians.³⁶

II. UK Proceedings

³⁰ British Museum Newspaper Archive, 'Death Charges Dictator Held in London Clinic' *Sunday Mirror* (18 October 1998).

³¹ Michael Byers, 'The Law and Politics of the Pinochet Case' (2000) 10 *Duke Journal of Comparative and International Law*, 423 <<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1221&context=djcil>> accessed 5 October 2023.

³² BBC News, 'Pinochet Retreats to Luxury Estate' (2 December 1998) <<http://news.bbc.co.uk/2/hi/225567.stm>> accessed 23 October 2023.

³³ Warren Hoge, 'Pinochet's Case Moves to Realm of Blair's Aides' *The New York Times* (27 November 1998) <<https://www.nytimes.com/1998/11/27/world/pinochet-s-case-moves-to-realm-of-blair-s-aides.html>> accessed 5 July 2022.

³⁴ Lee Anderson, 'The Dictator' (n 2).

³⁵ Hoge, 'Pinochet's Case Moves to Realm of Blair's Aides' (n 33).

³⁶ Rory Carroll, Ian Black and John Hopper, 'Pinochet Decision for Straw' *The Guardian* (19 October 1998) <<https://www.theguardian.com/politics/1998/oct/19/immigrationpolicy>> accessed 2 October 2023.

In response to his arrest, Pinochet hired some of London's leading criminal defense lawyers. They immediately filed a writ of *habeas corpus* before the High Court and sought leave for judicial review, alleging that the Home Secretary Jack Straw had acted wrongfully by not ordering Pinochet's release.³⁷ The crux of their argument was that as the Chilean Head of State during the period in which most of the alleged crimes were committed, Pinochet was immune from the jurisdiction of the British courts under the 1978 State Immunity Act.

A. High Court of England and Wales

On 28 October 1998, the Pinochet case was heard for the first time by a panel of three judges headed by Lord Chief Justice Bingham in the High Court. With regard to the first arrest warrant, Lord Chief Justice Bingham held that it was defective, as the crimes for which extradition had been requested by Spain – the murder of Spanish citizens in Chile – did not qualify as extradition crimes under the 1989 UK Extradition Act.³⁸

By contrast, the second arrest warrant focused on alleged crimes of torture. This was important as torture was an extraterritorial offence under English law following the adoption of section 134 of the 1988 Criminal Justice Act. Notwithstanding this, the High Court held that Pinochet was immune from the UK's jurisdiction, as the alleged crimes were official acts performed in the exercise of Pinochet's functions as Head of State.³⁹ The legal basis of this immunity was section 20 of the 1978 State Immunity Act, which grants to Head of States the same privileges and immunities, subject to "any necessary modification" as those conferred on the heads of diplomatic missions under the 1961 Vienna Convention on Diplomatic Relations.

Throughout the litigation, there were two notable arguments submitted by the Crown Prosecution Service on behalf of Spain, that were straightforwardly rejected by the High Court. The first was that the alleged crimes were of such a serious nature that they could not amount to 'official acts' performed by Pinochet in the exercise of his functions as Head of State.⁴⁰ This argument was dismissed by Justice Collins who noted, "history shows us that it has indeed on occasions been state policy to exterminate or to oppress particular groups" and that accordingly he could see "no justification for reading any limitation based on the nature of the crimes committed into the immunity which exists."⁴¹

Second, the Court rejected the argument submitted by Mr Alun Jones QC that there can be no immunity for a former Head of State who is accused of committing crimes against humanity. These are crimes which are, "so deeply repugnant to any notion of morality" and include genocide, torture, the taking of hostages and "other crimes of a similarly offensive character."⁴² In assessment of this argument, the Court drew attention to the Nuremberg Charter (1945), and the Statutes of the International Tribunals for the Former Yugoslavia (1993) and Rwanda (1994), all of which explicitly exclude claims of immunity by a former Head of State as a method of averting criminal responsibility.⁴³ The Court then distinguished

³⁷ Byers, 'The Law and Politics of the Pinochet Case' (n 31), 423

³⁸ *Augusto Pinochet Ugarte* [1999] ILM 38 (Q.B. Div'l Ct, 1998) [34].

³⁹ *Ibid.*

⁴⁰ *Augusto Pinochet Ugarte* (n 38) [80].

⁴¹ *Ibid.*, [80].

⁴² *Ibid.*, [63].

⁴³ Charter of the International Military Tribunal (Nuremberg) 1945, Article 7; Statute of the International Criminal Tribunal for the Former Yugoslavia 2001, Article 7; Statute of the International Criminal Tribunal for

these instruments from the case at hand, on the basis that they were international tribunals established by international agreement.⁴⁴ Furthermore, since the Nuremberg Charter and other Statutes explicitly accepted the applicability of extraterritorial jurisdiction, they “did not therefore violate the principle that one sovereign state will not implead another in relation to its sovereign acts.”⁴⁵

Ultimately, while Pinochet was found to be immune, the High Court did not immediately quash the second arrest warrant as the Court granted leave to appeal to the House of Lords on the point of immunity.

B. House of Lords: Pinochet I

As expected, the Pinochet case was appealed to the House of Lords, the court of final appeal in the UK at the time. The Law Lords rendered their judgment – known as *Pinochet (No. 1)* – on 25 November 1998, which also happened to be Pinochet’s 83rd birthday. In reversal of the lower court’s ruling, the Lords held by a 3:2 majority that Pinochet was not immune, as the alleged acts of torture and hostage-taking were not ‘official’ acts performed in the exercise of his functions as Head of State within the meaning of the statute.

Of the majority, Lord Nicholls (with whom Lord Hoffmann concurred) reasoned that Pinochet’s alleged acts could not be regarded by international law as a function of a Head of State. This was on the basis that international law has “made plain that certain types of conduct, including torture and hostage-taking, are not acceptable conduct on the part of anyone” and that “the contrary conclusion would make a mockery of international law.”⁴⁶

Lord Steyn took a slightly different approach, by drawing attention to the evolution of international law. He said, “the development of international law since the Second World War justifies the conclusion that by the time of the 1973 coup d’état, and certainly ever since, international law condemned genocide, torture, hostage taking and crimes against humanity...as international crimes deserving of punishment.”⁴⁷ Given this evolution, it was impossible for Lord Steyn to “maintain that the commission of such high crimes may amount to acts performed in the exercise of the functions of a Head of State.”⁴⁸

In dissent, Lord Lloyd held that Pinochet was immune as a former Head of State both under customary international law and under the 1978 State Immunity Act. He pointed out that under customary international law, immunity is not accorded for the benefit of the former Head of State himself, but rather for the state of which he was once head.⁴⁹ Therefore, any international law obligations are owed to that state and not to the individual. Lord Lloyd pointed out that rather than carrying out the alleged acts “with his own hands,” Pinochet was accused of organising the “commission of such crimes, including the elimination of his political opponents, as head of the Chilean government”.⁵⁰ In essence, he gave the orders. This supported Lord Lloyd’s conclusion that Pinochet’s alleged crimes were sovereign acts and thus covered by immunity.

Rwanda 1994, Article 6.

⁴⁴ *Augusto Pinochet Ugarte* (n 38) [68].

⁴⁵ *Ibid.*

⁴⁶ *R v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No. 1)* [2000] 1 AC 61 [40].

⁴⁷ *Ibid.*, [45].

⁴⁸ *Ibid.*, [45].

⁴⁹ *Ibid.*, [23].

⁵⁰ *Ibid.*, [27].

In response to the argument that some crimes are so horrific that an exception must be made to immunity under customary international law, Lord Lloyd suggested that it is difficult to know “where to draw the line.”⁵¹ In his mind, it would be “unjustifiable in theory, and unworkable in practice, to impose any restriction on head of state immunity by reference to the number or gravity of the alleged crimes.”⁵² Furthermore, the special international tribunals set up to adjudicate crimes committed in the Former Yugoslavia and Rwanda supported his conclusion that when crimes against humanity are committed by Heads of State or other responsible government officials, they “cannot be tried in the ordinary courts of other states.”⁵³

Also in dissent, Lord Slynn held that Pinochet benefited from immunity both under the 1978 State Immunity Act and customary international law. Notably, Lord Slynn conceded the possibility that immunity *ratione materiae* retained by a former Head of State after ceasing service could be affected by the emerging notion of individual crimes under international law. However, he found that there was no evidence of “any state practice or general consensus let alone a widely supported convention that all crimes against international law should be justiciable in national courts on the basis of the universality of jurisdiction.”⁵⁴ Therefore, he concluded that there is “no universal rule that all crimes are outside immunity *ratione materiae*.”⁵⁵

Finally, Lord Slynn also considered whether the UK and Chile had agreed to override immunity enjoyed by a former Head of State with regards to the crime of torture via ratification of the 1984 UN Torture Convention. This would depend on whether a former Head of State was covered by the words “a public official or other person acting in an official capacity” under Article 1. Ultimately, he found that the reference to public officials in the Convention did not cover former Heads of State. Therefore, according to Lord Slynn, if States did wish to exclude immunity of former Heads of State in respect of specific crimes, they must do so in “clear terms.”⁵⁶

Following the Law Lords’ judgment in *Pinochet I*, the case then passed to the Home Secretary Jack Straw who had the option to either quash or grant authority to proceed with the extradition process as stipulated by sections 7 and 12 of the 1989 Extradition Act. On 9 December 1999 – one day before the 50th anniversary of the Universal Declaration of Human Rights – Straw granted authority to proceed with the extradition.

C. Pinochet II

The Pinochet saga then took an unexpected turn as Pinochet’s counsel made a significant discovery. They found that Lord Hoffmann, who sat on the *Pinochet I* case, also served as Director of Amnesty International Charity Limited, a branch of Amnesty International. Crucially, Amnesty International, along with a number of other human rights organisations, had been granted leave to intervene in the *Pinochet I* appeal. It was at this point, they argued, that Lord Hoffmann should have disclosed his connections with Amnesty International.

⁵¹ *R v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No. 1)* (n 46), [28]

⁵² *Ibid.*

⁵³ *Ibid.*, [30].

⁵⁴ *Ibid.*, [12].

⁵⁵ *Ibid.*, [15].

⁵⁶ *Ibid.*, [18].

Consequently, they argued that his failure to do so undermined confidence in the House of Lords' decision.⁵⁷

Pinochet's legal team petitioned for the House of Lords to set aside its previous decision, on the ground that the link between Lord Hoffmann and Amnesty International gave the appearance of bias. In an unprecedented ruling on 15 January 1999, the House of Lords set aside its previous decision in *Pinochet I* and ordered a rehearing.⁵⁸ This was done on the basis that by virtue of his relationship with Amnesty International, Lord Hoffmann was automatically disqualified from sitting on the hearing of the appeal. As stated by Lord Browne-Wilkinson, "if the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is involved, whether personally or as a director of a company, in promoting the same causes in the same organisation as is a party to the suit."⁵⁹ While there had been no suggestion that Lord Hoffmann had actually been biased, this was beside the point, as "it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done".⁶⁰

D. Friendship with Margaret Thatcher

During these tumultuous months for Pinochet, he had one particularly vocal supporter: former Prime Minister Margaret Thatcher. While they never met while in power, Thatcher was impressed by the success of Chile's neoliberal economic program under Pinochet and his brutal approach to dealing with Communism in Latin America.⁶¹ Furthermore, it seems that Thatcher felt somewhat indebted as Chile had provided significant assistance to Thatcher's government during the 1982 Falklands War.⁶²

According to the *New Yorker*, the relationship between the pair became "downright cozy,"⁶³ so much so that Pinochet would send Thatcher flowers and chocolate and the pair would meet for tea on his annual trips to London.⁶⁴ Following Pinochet's arrest, Thatcher was outspoken in her support for the former dictator, writing in a letter to *The Times* that "it is not for Spain, Britain or any other country to interfere in what is an internal matter for Chile."⁶⁵ While Pinochet was under house arrest in Surrey, Thatcher sent him a bottle of single malt whisky with an accompanying note that read, "Scotch is one British institution that will never let you down."⁶⁶

E. Pinochet III

⁵⁷ *R v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No. 2)* [2000] 1 AC 119.

⁵⁸ *Ibid.*

⁵⁹ *R v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No. 2)* (n 57), [135].

⁶⁰ *Ibid.*, [135].

⁶¹ Mat Youkee, 'Thatcher Sent Pinochet Finest Scotch during Former Dictator's UK House Arrest' *The Guardian* (4 October 2019) <<https://www.theguardian.com/world/2019/oct/04/margaret-thatcher-pinochet-chile-scotch-malt-whisky>> accessed 30 October 2023.

⁶² Jon Lee Anderson, 'Neruda, Pinochet, and the Iron Lady' *The New Yorker* (9 April 2013) <<https://www.newyorker.com/news/daily-comment/neruda-pinochet-and-the-iron-lady>> accessed 7 July 2022; Associated Press Archive, 'Various: Reaction to Pinochet Decision' *YouTube* (2 March 2000) <https://youtu.be/gIL2sfOkAe0?si=IPITA0_GWy7Wyn0v> accessed 30 October 2023.

⁶³ *Ibid.*

⁶⁴ Lee Anderson, 'The Dictator' (n 2)

⁶⁵ British Museum Newspaper Archive, 'Thatcher Pleads 'Free Pinochet'' *Daily Mirror* (22 October 1998).

⁶⁶ Youkee, 'Thatcher Sent Pinochet Finest Scotch during Former Dictator's UK House Arrest' (n 61).

A seven-judge panel was constituted to rehear the Pinochet case, so as to lend greater authority to the new decision in this highly unusual situation. The Law Lords handed down their new judgment – *Pinochet (No. 3)* – on 24 March 1999, the same day NATO aircrafts began dropping bombs on the Federal Republic of Yugoslavia “to halt the humanitarian catastrophe that was then unfolding in Kosovo”.⁶⁷

The world awaited the Pinochet decision in anticipation, especially in Chile. As reported in the *Irish Independent*, the city of Santiago came to a standstill to hear the Law Lords’ ruling. Football matches were cancelled and companies gave their workers an extended lunch break to watch the decision announced on television.⁶⁸

By a majority of 6:1, it was held that a former Head of State was not immune for acts of torture or conspiracy to torture committed after 8 December 1988, the date when the UK ratified the 1984 UN Convention against Torture. This judgment was quite different from *Pinochet (No. 1)* in its treatment of two critical issues: the qualification of extradition crimes, and the role attributed to the Torture Convention for the purpose of denying immunity.

As noted above, the power to extradite Pinochet to Spain for an “extradition crime” was contained in the 1989 Extradition Act. An important requirement under the Act was that the conduct complained of must have constituted a crime under both Spanish and UK law at the time - the double criminality rule. As a result, two dates played an important role in the judgment – 28 September and 8 December 1988 – being the dates when the Convention against Torture was incorporated into English law and the UK’s ratification of the Convention. As a result, criminal charges before these critical dates were excluded, thereby radically reducing the number of charges upon which Pinochet’s extradition could be sought.

On the central issue of immunity, instead of basing their decision on customary international law, the majority relied primarily on the Torture Convention and Criminal Justice Act. Of the majority, Lord Browne-Wilkinson’s approach was that the idea of continued immunity for a former Head of State was inherently inconsistent with the provisions of the Torture Convention. In his view, the Torture Convention provided worldwide jurisdiction for the crime of torture and further required all states parties to ban and outlaw torture under Article 2. Accordingly, he posited “how can it be for international law purposes an official function to do something which international law itself prohibits and criminalises?”⁶⁹

As immunity for ex-Heads of State is not explicitly excluded in the Convention, his reasoning seemed to depend on an implied waiver in the Convention. His opinion appealed to pragmatism, suggesting that the implementation of a universal torture regime through the Torture Convention that also upheld immunity *ratione materiae* would produce “bizarre results” and “render abortive” the notion of universal jurisdiction over torture committed by state officials.⁷⁰

Three of the Law Lords – Lord Hope, Lord Millett and Lord Phillips – focused their analysis on the fact that state torture had been recognised as an international crime that could

⁶⁷ NATO, ‘Kosovo Air Campaign (March-June 1999)’ (17 May 2022) <https://www.nato.int/cps/en/natohq/topics_49602.htm>.

⁶⁸ British Museum Newspaper Archive, ‘Pinochet Ruling Casts Doubt on Extradition’ *Irish Independent* (25 March 1999).

⁶⁹ *R v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No. 3)* [2000] 1 AC 147 [14].

⁷⁰ *Ibid*, [14]-[15].

not viably coexist with immunity *ratione materiae*. This conflict was summarised by Lord Millett, who stated, “international law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is co-extensive with the obligation it seeks to impose.”⁷¹ Therefore, the ratification of the Torture Convention by Chile, Spain and the UK was viewed as an affirmation that state torture is an international crime of universal jurisdiction that should be prevented and punished accordingly. By focusing their analysis on the evolution of international crimes, this approach seems to move away from the classical state-centred theory of international law. Such a transition was acknowledged by Lord Millett, who explained that “international law has not become a crystallised code at any time ... it is a living and expanding branch of the law.”⁷²

In sole dissent, Lord Goff discussed both the issue of international crimes and implied waiver of immunity. In the first place, he suggested that former Heads of State can be held internationally accountable for certain crimes, including torture, referring to the Nuremburg and Tokyo Charters, the Statute of the International Tribunal for the Former Yugoslavia and the 1996 International Law Commission Draft Code of Crimes. However, he pointed out that these instruments are “all concerned with international responsibility before international tribunals, and not with the exclusion of state immunity in criminal proceedings before national courts.”⁷³ He then agreed with the conclusion of Lord Slynn in *Pinochet (No. 1)*, that “except in regard to crimes in particular situations before international tribunals these measures did not in general deal with the question whether otherwise existing immunities were taken away.”⁷⁴ Following from this conclusion, he suggested that if former Head of State immunity in respect of torture was to be excluded at all, this could only have occurred via the Torture Convention.

Lord Goff argued that a state’s waiver of its immunity by treaty must always be express.⁷⁵ In support, he pointed to the 116 state parties to the Convention as reinforcing the “strong impression” that no State would have silently agreed to the exclusion of state immunity *ratione materiae* via ratification.⁷⁶ He then cautioned, “how extraordinary it would be, and indeed what a trap would be created for the unwary, if state immunity could be waived in a treaty *sub silentio*” and therefore “common sense” supported the conclusion that this could not be done.⁷⁷

Ultimately, despite the strong dissent, the majority of the Law Lords held that Pinochet was not immune for the alleged acts of torture or conspiracy to torture committed after 8 December 1988.

F. Reactions to the Judgment

The global reaction to the outcome of the Pinochet case was mixed. Some heralded the decision as a milestone in international law. Following the verdict, in Santiago, thousands of human rights activists and families of victims who disappeared during the Pinochet regime marched through the capital with banners hailing the verdict as a “landmark victory in

⁷¹ *R v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No. 3)* (n 69) [74]-[75].

⁷² *Ibid*, [75].

⁷³ *Ibid*, [20].

⁷⁴ *Ibid*.

⁷⁵ *Ibid*, [22].

⁷⁶ *Ibid*, [27].

⁷⁷ *Ibid*.

defence of humanity.”⁷⁸ The reaction was similarly positive in Geneva, where the UN High Commissioner for Human Rights Mary Robinson welcomed the ruling as a “vigorous endorsement of the view that torture is an international crime subject to universal jurisdiction. National courts can try torturers even when the crime has been committed elsewhere.”⁷⁹ The International Commission of Jurists went even further by suggesting that, “the decision will have a dissuasive effect on the perpetrators of horrendous crimes such as genocide, crimes against humanity and war crimes.”⁸⁰

On the other hand, several leading academics in international law were not as optimistic. In the UK, Colin Warbrick, Dominic McGoldrick and Hazel Fox suggested that a close reading of the *Pinochet III* judgment tended to elicit a “sense of disquiet for an international lawyer.”⁸¹ In particular, they point out fundamental issues with the majority’s attempt to occupy a moral high ground; deploy matters of international law which were not accepted or recognised by the majority of states; and intervene in a dispute which was inherently political in nature.⁸²

G. Final Magistrate Decision

Following the Law Lords’ decision in *Pinochet (No. 3)* and a subsequent grant of authority to proceed with extradition by Home Secretary Jack Straw, the final legal hurdle to extradition was a hearing that took place in Bow Street Magistrates Court. The judge considered charges from *Pinochet (No. 3)*, as well as a number of new charges subsequently filed by Judge Garzón. Garzón’s allegations included accounts of brutal beatings, burnings, partial asphyxiation and fatal electronic shock treatment.⁸³ According to Alun Jones QC, who represented the Spanish authorities, these were “some of the most serious allegations of crime ever to come before English criminal courts.”⁸⁴

On 8 October 1999, the magistrate ruled that Pinochet could be extradited to Spain and committed him on thirty-four charges of torture and one charge of conspiracy to commit torture.⁸⁵ Pinochet’s extradition to Spain to stand trial appeared to be imminent.

However, in response to the magistrates’ decision, the Chilean Government requested that Jack Straw consider releasing Pinochet on medical grounds.⁸⁶ Straw acceded to this request and arranged a medical examination of Pinochet by four prominent British doctors, which

⁷⁸ British Museum Newspaper Archive, ‘Pinochet Ruling Casts Doubt on Extradition’ *Irish Independent* (25 March 1999).

⁷⁹ Office of the UN High Commissioner for Human Rights, ‘Law Lords’ Decision in Pinochet is Another Significant Step in Struggle against Impunity’ (24 March 1999) <<https://www.ohchr.org/en/press-releases/2009/10/high-commissioner-human-rights-law-lords-decision-pinochet-case-another>> accessed 1 August 2022.

⁸⁰ International Commission of Jurists, ‘Crimes against Humanity – Pinochet Faces Justice’ (n 18), 48.

⁸¹ Colin Warbrick, Dominic McGoldrick and Hazel Fox, ‘The Pinochet Case No. 3’ (1999) 48(3) *International & Comparative Law Quarterly*, 687.

⁸² *Ibid*, 687-702.

⁸³ Jamie Wilson, ‘Pinochet Accused of 35 Torture Charges at Hearing’ *The Guardian* (27 September 1999) <<https://www.theguardian.com/world/1999/sep/28/pinochet.chile>> accessed 2 October 2023.

⁸⁴ *Ibid*.

⁸⁵ Human Rights Watch, ‘The Extradition of General Pinochet’ (14 October 1999) <<https://www.hrw.org/news/1999/10/14/extradition-general-augusto-pinochet>> accessed 5 August 2022.

⁸⁶ Jonathan Franklin, ‘Chile Makes Pinochet Plea to Straw’ *The Guardian* (15 October 1999) <<https://www.theguardian.com/world/1999/oct/16/pinochet.chile>> accessed 10 October 2023.

ultimately established that he was unfit to stand trial.⁸⁷ While the examination was not released publicly on the basis of confidentiality, it was eventually leaked to the media.⁸⁸ It revealed that that Pinochet was in fact quite ill. He was suffering extensive brain damage and his memory had been severely affected; therefore, they concluded, he would be incapable of following the process of a trial so as to instruct his lawyers.⁸⁹

On the basis of the medical examination results, Straw called off Pinochet's extradition to Spain and allowed the former dictator to return to Chile on 2 March 2000.⁹⁰ While Pinochet was taken out of the UK in a wheelchair, upon arriving in Santiago he stood from his chair and triumphantly walked, slowly but steadily, across the tarmac to the music of a military brass band.⁹¹

III. Return to Chile

Upon Pinochet's return to Chile, significant efforts begun to prosecute the former dictator under the domestic legal system, driven by Chilean lawyers.⁹² Dozens of cases were lodged against him in Chilean courts, with dozens more following in the weeks after his return.⁹³ Previously, Chile's court system had been paralyzed by a Pinochet-era amnesty law that prevented prosecutions of those responsible for abuses committed from 1973 to 1978.⁹⁴ It was not until Pinochet's arrest in London and eventual return to Chile that the judiciary stopped using this amnesty law to dismiss cases, and special judges were appointed to investigate these crimes.⁹⁵ Two days after Pinochet's return, the Chilean Judge Juan Guzmán requested the Court of Appeals of Santiago to lift Pinochet's immunity as a senator for life in order to indict him.⁹⁶ This request was granted and later upheld by the Supreme Court of Chile, which stripped Pinochet of his parliamentary immunity in August 2000.⁹⁷

⁸⁷ Byers, 'The Law and Politics of the Pinochet Case' (n 31), 437.

⁸⁸ Byers, 'The Law and Politics of the Pinochet Case' (n 31), 438.

⁸⁹ Byers, 'The Law and Politics of the Pinochet Case' (n 31), 438.

⁹⁰ Nicholas Watts, 'Pinochet to be Set Free' *The Guardian* (12 January 2000) <<https://www.theguardian.com/world/2000/jan/12/pinochet.chile3>> accessed 30 October 2023; Associated Press Archive, 'Various: Reaction to Pinochet Decision' *YouTube* (2 March 2000) <https://youtu.be/gIL2sfOkAe0?si=IPITA0_GWy7Wyn0v> accessed 30 October 2023.

⁹¹ Alex Bellos and Jonathan Franklin, 'Pinochet Receives a Hero's Welcome on his Return' *The Guardian* (3 March 2000) <<https://www.theguardian.com/world/2000/mar/04/pinochet.chile1>> accessed 30 October 2023.

⁹² Anthony Faiola, 'Chile Reacts Emotionally to Pinochet Ruling' *The Washington Post* (12 January 2000) <<https://www.washingtonpost.com/archive/politics/2000/01/12/chile-reacts-emotionally-to-pinochet-ruling/eb317bcf-8d47-402f-8bc1-a08b793a2ad4/>> accessed 30 October 2023; CNN, 'Chile has Mixed Reaction to Release of Gen. Augusto Pinochet' (2 March 2000) <<http://www.cnn.com/TRANSCRIPTS/0003/02/wv.06.html>> accessed 30 October 2023.

⁹³ Rebecca Evans, 'Pinochet in London: Pinochet in Chile: International and Domestic Politics in Human Rights Policy' (2006) 28(1) *Human Rights Quarterly*, 235 <<https://www.jstor.org/stable/20072729>> accessed 20 October 2023.

⁹⁴ Pascale Bonnefoy, 'Decades after Dictatorship, Chile Mounts Search for Hundreds Who Vanished' *The New York Times* (30 August 2023) <<https://www.nytimes.com/2023/08/30/world/americas/chile-military-coup-disappeared-search.html>> accessed 12 October 2023.

⁹⁵ Stacie Jonas, 'The Ripple Effect of the Pinochet Case' (2004) 11(3) *Human Rights Brief*, 7 <<https://biblioteca.corteidh.or.cr/tablas/r35103.pdf>> accessed 30 October 2023.

⁹⁶ Clifford Krauss, 'Freed by Britain, Pinochet is Facing a Battle at Home' *The New York Times* (3 March 2000) <<https://www.nytimes.com/2000/03/03/world/freed-by-britain-pinochet-is-facing-a-battle-at-home.html>> accessed 20 September 2023.

⁹⁷ Human Rights Watch, 'Chile Supreme Court Rejects Pinochet Immunity' (8 August 2000) <<https://www.hrw.org/news/2000/08/08/chile-supreme-court-rejects-pinochet-immunity>> accessed 25 September 2023.

Following the removal of immunity, on 1 December 2000, Judge Juan Guzmán ordered Pinochet to be held under house arrest after charging him as the mastermind of acts in the so-called “Caravan of Death”, a Chilean Army death squad that carried out the kidnapping and forced disappearance of at least 70 political prisoners shortly after Pinochet came to power.⁹⁸ At this point in time, Pinochet was faced with 177 criminal complaints all stemming from alleged human rights violations committed during his time in power.⁹⁹ However, shortly after on 11 December 2000, Judge Guzmán’s ruling was suspended by the Court of Appeals of Santiago on due process grounds.¹⁰⁰

While the attempts to hold Pinochet legally accountable only gained momentum, this back-and-forth continued in the Chilean courts right up until Pinochet’s death on 10 December 2006. Ultimately, Pinochet died without having been convicted of any of the crimes of which he was accused, with 300 criminal charges still pending against him in Chile.¹⁰¹

IV. Legacy: A Pinochet Precedent?

A. Accountability within Chile

In addition to the political and social impacts of the Pinochet cases, questions remain as to its legacy for the evolution of international law as a whole. In the first place, the former dictator’s arrest and extradition forced Chilean society into a reckoning with the darkest chapters of the country’s history. As suggested by Chilean law professor José Zalaquett, while the Pinochet cases initially polarised Chile – by re-igniting old passions between supporters and opponents of the former dictator – they ultimately helped to usher in a new era of openness about the past.¹⁰² Zalaquett suggests that this openness was facilitated by a new generation of judges, who were appointed following the return of democracy to Chile in 1990, and who actively pursued investigations into human rights abuses under the regime.¹⁰³ This national reckoning with the past is still underway within Chile and elsewhere, as demonstrated by Spain’s recent decision to strip the deceased former leader of a Spanish military honour bestowed on him more than 40 years ago.¹⁰⁴

In terms of legal accountability, the majority of Chilean society believed that Pinochet should be held accountable. In 1999, opinion polls in Chile showed that over 60% of respondents believed that Pinochet should be tried for his alleged crimes.¹⁰⁵ Yet, Pinochet never had his day in court, neither in Spain nor Chile. Following Pinochet’s death in 2006, Chilean courts

⁹⁸ BBC News, ‘Pinochet Charged with Kidnapping’ (1 December 2000) <<http://news.bbc.co.uk/2/hi/americas/1050374.stm>> accessed 13 October 2023.

⁹⁹ Ibid.

¹⁰⁰ Anthony Faiola, ‘Chilean Court Voids Pinochet Indictment, House Arrest’ *The Washington Post* (12 December 2000) <<https://www.washingtonpost.com/archive/politics/2000/12/12/chilean-court-voids-pinochet-indictment-house-arrest/03e7922b-ad17-41dc-992e-8ce9bb428460/>> accessed 20 October 2023.

¹⁰¹ Charis McGowan, ‘Chile Marks 50 Years Since Pinochet’s Brutal Coup’ *Al Jazeera* (11 September 2023) <<https://www.aljazeera.com/news/2023/9/11/chile-marks-50-years-since-pinochets-brutal-coup>> accessed 10 October 2023.

¹⁰² Cynthia Arnson, ‘Pinochet Case Brings Catharsis to Chile’ *Wilson Center* (14 January 2000) <<https://www.wilsoncenter.org/article/pinochet-case-brings-catharsis-to-chile>> accessed 10 October 2023.

¹⁰³ Ibid.

¹⁰⁴ The Associated Press, ‘Spain Strips Deceased Former Chilean President Pinochet of a Spanish Military Honor’ (12 September 2023) <<https://abcnews.go.com/International/wireStory/spain-strips-deceased-former-chilean-president-pinochet-spanish-103113489>> accessed 15 October 2023.

¹⁰⁵ Richard Lagos and Heraldo Muñoz, ‘The Pinochet Dilemma’ (Spring, 1999) *Foreign Policy* 37 <<https://doi.org/10.2307/1149588>> accessed 9 October 2023.

have continued to prosecute and convict former military personnel accused of committing grave crimes under the military dictatorship from 1973 to 1990. For example, in March 2021, a Chilean court convicted thirty-one former agents for their role in the 1974 disappearances of moviemakers Carmen Bueno Cifuentes and Jorge Muller Silva through Operación Colombo, during which state security forces forcibly disappeared 119 political prisoners.¹⁰⁶ As of January 2023, the Supreme Court of Chile has issued some 640 rulings, sending hundreds to prison, and has 17 judges exclusively dedicated to nearly 1,500 cases.¹⁰⁷

While these prosecutions are a positive development, legal hurdles remain. For example, as part of Chile's transition to democracy from dictatorship, the National Commission on Political Prisoners and Torture was formed to collect the testimonies of torture victims from September 2003 to June 2005.¹⁰⁸ Following this process, a 50-year secrecy order was placed on all information collected by the Commission, thereby prohibiting access to the archives by any person, authority, or magistrate, except for the right of the holders of the statements and documents to make them public.¹⁰⁹ This secrecy order is still in force today.

B. Impact on International Law

For many years, there has been lively debate as to whether the Pinochet case has set a precedent for an international crimes exception to immunity *ratione materiae*.

Accountability for Abuses

There were many voices who argued that the Pinochet case was transformational, including Human Rights Watch, who viewed Pinochet's London arrest as having strengthened a new international movement – spurred by the killings committed in Bosnia and Rwanda and facilitated by the end of the Cold War – to end impunity for the worst abuses.¹¹⁰ Arguably, this position did ring true in the immediate aftermath of the case and likely contributed to the increasing momentum towards the establishment of the International Criminal Court in 2002. As suggested by Lord Lloyd of Berwick during a House of Lords debate on the International Criminal Court Bill on 15 January 2001, the “Pinochet case proves the need for a court such as the International Criminal Court.”¹¹¹

In addition, the judgment of the House of Lords in *Pinochet (No. 3)* was soon followed by international indictments for other former heads of state, including former President of the Federal Republic of Yugoslavia Slobodan Milošević and former Chadian dictator Hissène Habré, referred to as ‘Africa's Pinochet’.¹¹² As regards the alleged crimes of Habré, a commission set up in 1992 uncovered that Chadian security forces had committed an

¹⁰⁶ Human Rights Watch, ‘Chile: Events of 2020’ (2020) <<https://www.hrw.org/world-report/2021/country-chapters/chile>> accessed 5 October 2023.

¹⁰⁷ Pascale Bonnefoy, ‘Decades after Dictatorship, Chile Mounts Search for Hundreds Who Vanished’ *The New York Times* (30 August 2023) <<https://www.nytimes.com/2023/08/30/world/americas/chile-military-coup-disappeared-search.html>> accessed 12 October 2023.

¹⁰⁸ United States Institute of Peace, ‘National Commission on Political Imprisonment and Torture’ <<https://www.usip.org/publications/2003/09/commission-inquiry-chile-03>> accessed 29 October 2023.

¹⁰⁹ Felipe Téllez Guzmán, ‘The Secrecy of the Archives of Chile's National Commission on Political Prisoners and Torture and its Problematic Relationship with the Right to Justice’ *Nuremberg Human Rights Center* (2023) <<https://www.menschenrechte.org/en/wp-content/uploads/sites/2/2023/02/Secrecy-of-the-archives-of-the-Valech-comission-1.pdf>> accessed 5 October 2023.

¹¹⁰ Human Rights Watch, ‘Pinochet: Justice and the General’ (11 December 2006) <<https://www.hrw.org/news/2006/12/11/pinochet-justice-and-general>> 14 October 2023.

¹¹¹ House of Lords Debate, 15 January 2001, Volume 620.

estimated 40,000 political murders and 200,000 cases of torture during his eight years in power before he was deposed in 1990.¹¹³ Following years of legal back-and-forth and pressure from Belgium, in August 2012 the International Court of Justice ordered Senegal (where Habré was residing in exile) to either prosecute or extradite him so that he could stand trial without further delay.¹¹⁴ In response, Senegal and the African Union established the Extraordinary African Chambers (EAC) in Senegal to prosecute Habré for crimes committed by his regime in Chad.¹¹⁵

Following a long trial, in May 2016 Habré was convicted by the EAC of war crimes, crimes against humanity and acts of torture and was later sentenced to life in prison.¹¹⁶ The historic trial was the first time that an African defendant was convicted of war crimes committed on African soil, and the first time that a deposed head of state faced justice for atrocities committed by his security forces in the courts of another country.¹¹⁷ In addition to highlighting the need for an International Criminal Court, the Pinochet cases also sent a strong message that the prosecution of former heads of state for grave crimes is not only laudable but also legally possible.

Immunity of State Officials

The prevailing narrative surrounding the legacy of the Pinochet cases has increasingly focused on the legal issue at the heart of the case: immunity. At the time, many commentators suggested that the Judgment in *Pinochet (No. 3)* represented an “immunity watershed” insofar as the immunity of former heads of state could now be waived on the basis of State treaty obligations.¹¹⁸ This view was in some ways reinforced by Article 27 of the Rome Statute of the International Criminal Court, which expressly provided that immunity, whether under national or international law, does not bar the Court from exercising its jurisdiction.¹¹⁹ But we still do not have a consensus that such a broad waiver of immunity exists vis-à-vis domestic courts. As conveyed by the ILC, there are currently “insufficient grounds for concluding that the existence of such treaty obligations can automatically and generally be understood to waive the immunity of State officials...”¹²⁰

¹¹² David Sugarman, ‘The Arrest of Augusto Pinochet: Ten Years On’ *Global Policy Forum* (29 October 2008) <<https://archive.globalpolicy.org/intljustice/wanted/2008/1029tenyearson.htm>> accessed 29 October 2023; Krishnadev Calamur, ‘The Legacy of the Pinochet Trial’ *The Atlantic* (17 October 2015) <<https://www.theatlantic.com/international/archive/2015/10/chad-habre-trial-pinochet/411004/>> accessed 29 October 2023.

¹¹³ Human Rights Watch, ‘‘Africa’s Pinochet’ Faces Extradition and Trial for Crimes against Humanity’ (29 September 2005) <<https://www.hrw.org/news/2005/09/29/africas-pinochet-faces-extradition-and-trial-crimes-against-humanity>> accessed 30 July 2022.

¹¹⁴ Questions Relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*) (Judgment) ICJ Rep 2012.

¹¹⁵ International Crimes Database, ‘Hissène Habré v. Republic of Senegal’ (18 November 2010) <<https://www.internationalcrimesdatabase.org/Case/220>> accessed 5 October 2023.

¹¹⁶ Trial International, ‘Hissène Habré’ (2016) <<https://trialinternational.org/latest-post/hissene-habre/>> accessed 29 October 2023.

¹¹⁷ Charlotte Mohr, ‘The President on Trial: Prosecuting Hissène Habré’ (May 2022) *International Review of the Red Cross* <<https://international-review.icrc.org/articles/the-president-on-trial-prosecuting-hissene-habre-918>> accessed 9 October 2023.

¹¹⁸ Ingrid Wuerth, ‘Pinochet’s Legacy Reassessed’ (2012) 106(4) 765 *American Journal of International Law* <<https://doi.org/10.5305/amerjintelaw.106.4.0731>> accessed 9 October 2023.

¹¹⁹ Rome Statute of the International Criminal Court, Article 27.

¹²⁰ ILC, ‘Report of the International Law Commission on the Work of its Seventy-Third Session’ (18 April-3 June and 4 July-5 August 2022) UN Doc A/77/10, 259.

The absence of an automatic waiver of immunity is also seen in practice around the world. Recent decisions of national and international courts have now ruled in favour of state and status-based immunity, even in cases alleging grave human rights violations.¹²¹ Some courts have distinguished the holding in *Pinochet (No. 3)* on a variety of bases, such as the fact that it concerned issues of criminal jurisdiction or that the outcome depended upon the ratification of the Torture Convention. For example, in *Al-Adsani v United Kingdom*, while the European Court of Human Rights accepted that the prohibition of torture had achieved the status of a peremptory norm in international law, it distinguished the majority view in *Pinochet (No. 3)*, holding that the case did not provide a firm basis to conclude that the immunity *ratione personae* of foreign sovereign States is no longer enjoyed in respect of civil liability for claims of acts of torture.¹²²

The distinction between criminal and civil jurisdiction was reaffirmed by Lord Bingham in *Jones v Ministry of Interior for the Kingdom of Saudi Arabia*, where he stated that “the distinction between criminal proceedings (which were the subject of universal jurisdiction under the Torture Convention) and civil proceedings (which were not) was fundamental to [the decision in *Pinochet (No. 3)*]. This is not a distinction which can be wished away”.¹²³ Therefore, while the Pinochet cases can be seen as the high-water mark of attempts to hold senior officials accountable for human rights violations, they have not yet created a legal precedent.

Narrowing of Universal Jurisdiction Laws

The legacy of the Pinochet cases has also been a narrowing rather than a widening of universal jurisdiction laws. Some states have moved away from absolute universal jurisdiction towards a more limited jurisdiction. For example, Belgium has historically been very active in the area of universal jurisdiction, relying on its 1993 universal jurisdiction law to prosecute persons suspected of carrying out genocide, crimes against humanity and war crimes, without requiring a link between Belgium and the criminal act, the perpetrator, or the victim.¹²⁴ Belgium often relied on this law in order to issue international arrest warrants for state officials accused of grave crimes, for example, the warrant for the arrest of Abdoulaye Yerodia Ndongbasi, Minister of Foreign Affairs of the Democratic Republic of Congo in 2000.¹²⁵

Over the years, the number of cases being brought against world leaders in Belgium only grew, including against American officials such as George W. Bush. This led to immense political pressure for Belgium to repeal this law, which critics assailed as an attempt to circumvent the sovereignty of States. Such efforts were ultimately successful and resulted in

¹²¹ See for example: *Al-Adsani v United Kingdom*, App no 35763/97, 21 November 2001; Jurisdictional Immunities of the State (*Germany v Italy: Greece Intervening*) (Judgment) [2012] ICJ Report 2012; *Jones and others v United Kingdom* App nos 34356/06 and 40528/06, 12 January 2014. Also see for example the refusal of UK Metropolitan Police to arrest Lt. General Mahmoud Hegazy on basis of special mission immunity: <<https://trialinternational.org/latest-post/lt-general-mahmoud-hegazy/>>.

¹²² *Al-Adsani v United Kingdom*, App no 35763/97, 21 November 2001 [63].

¹²³ [2006] UKHL 26 [323].

¹²⁴ Open Society Justice Initiative and Trial International, ‘Universal Jurisdiction Law and Practice in Belgium’ (May 2022) <<https://www.justiceinitiative.org/uploads/b91142c3-5fef-49cb-a452-c147be4aca8a/universal-jurisdiction-law-and-practice-belgium-en-05232022.pdf>> accessed 3 October 2023.

¹²⁵ Note, however, the International Court of Justice eventually ordered Belgium to cancel the warrant on the basis of immunity, see: Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v Belgium*) (Judgment) [2002] ICJ Rep 2002.

Belgium narrowing the law in 2003.¹²⁶ Now, Belgian courts only have jurisdiction over international crimes if the offender is Belgian or has his primary residence in Belgium; if the victim is Belgian or has lived in Belgium for at least three years at the time the crimes were committed; or if Belgium is required by treaty to exercise jurisdiction over the case.¹²⁷ Belgium is not alone in this regard as there are several other countries that subscribe to “conditional” or “limited” conceptions of universal jurisdiction, including Spain,¹²⁸ France,¹²⁹ and Switzerland.¹³⁰

Nevertheless, there are still several countries with broad universal jurisdiction laws, including Germany and Sweden. Since 2002, German prosecutors have been able to exercise universal jurisdiction under the Code of Crimes against International Law. Investigations and prosecutions can be initiated into genocide, crimes against humanity and war crimes.¹³¹ Significantly, there are no material conditions to the applicability of universal jurisdiction for these crimes and the Code also applies to crimes committed outside Germany, regardless of the nationality of the victim or perpetrator or any other connections to Germany.¹³² Amongst other successful prosecutions, in recent years German courts have relied on universal jurisdiction to convict ISIS members (both German and non-German) of crimes against humanity, war crimes and genocide in relation to the group’s brutal campaign to annihilate the Yazidi community in Syria and Iraq.¹³³ Furthermore, Sweden also has broad universal jurisdiction laws applicable to crimes committed outside Swedish territory, regardless of where the crime took place or the nationality, residency or current location of the perpetrator and victim.¹³⁴

¹²⁶ DW, ‘Belgium Drops War Crimes Cases’ (25 September 2003) <<https://www.dw.com/en/belgium-drops-war-crimes-cases/a-978973>> accessed 14 October 2023.

¹²⁷ Human Rights Watch, ‘Belgium: Universal Jurisdiction Law Repealed’ (1 August 2003) <<https://www.hrw.org/news/2003/08/02/belgium-universal-jurisdiction-law-repealed>> accessed 14 October 2023; Open Society Justice Initiative and Trial International, ‘Universal Jurisdiction Law and Practice in Belgium’ (May 2022) <<https://www.justiceinitiative.org/uploads/b91142c3-5fef-49cb-a452-c147be4aca8a/universal-jurisdiction-law-and-practice-belgium-en-05232022.pdf>> accessed 3 October 2023.

¹²⁸ Ministry of Foreign Affairs and Cooperation, Contribution of Spain on the Topic ‘The Scope and Application of the Principle of Universal Jurisdiction’ 16-05499 (E) (Madrid, 22 February 2016) <https://www.un.org/en/ga/sixth/71/universal_jurisdiction/spain_e.pdf>.

¹²⁹ Cour de Cassation, ‘Press Release: Universal Jurisdiction of French Justice for Crimes Committed in Syria’ (12 May 2023) <<https://www.courdecassation.fr/en/toutes-les-actualites/2023/05/12/press-release-universal-jurisdiction-french-justice-crimes>>; France, Position on ‘The Scope and Application of the Principle of Universal Jurisdiction’ (New York, 27 April 2010) <https://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/France_E.pdf>.

¹³⁰ Swiss Confederation, Position of Switzerland on ‘The Scope and Application of the Principle of Universal Jurisdiction’ 2006086E (24 April 2020) <https://www.un.org/en/ga/sixth/75/universal_jurisdiction/switzerland_e.pdf>; see for example the recent war crimes ruling by a Swiss court against Liberian warlord Alieu Kosiah: Emma Farge, ‘Swiss Court Confirms Historic War Crimes Ruling against Liberia Warlord, *Reuters*, (1 June 2023) <<https://www.reuters.com/world/swiss-court-confirms-war-crimes-ruling-against-liberia-warlord-2023-06-01/>> accessed 30 October 2023.

¹³¹ Federal Republic of Germany, ‘Position of Germany on ‘The Scope and Application of the Principle of Universal Jurisdiction’ (12 October 2022) <https://www.un.org/en/ga/sixth/77/pdfs/statements/universal_jurisdiction/12mtg_germany.pdf>.

¹³² *Ibid.*

¹³³ Doughty Street Chambers, ‘German Court Delivers Third Genocide Verdict against ISIS Member for the Enslavement and Abuse of Yazidi Woman in Syria and Iraq’ (Koblenz, 21 June 2023) <<https://www.doughtystreet.co.uk/news/german-court-delivers-third-genocide-verdict-against-isis-member-enslavement-and-abuse-yazidi>>.

¹³⁴ The Syria Justice and Accountability Centre (SJAC), ‘A Guide to National Prosecutions in Sweden for Crimes Committed in Syria’ (2022) <<https://syriaaccountability.org/content/files/2022/04/Swedish-Jurisdiction-Guide-EN--1-.pdf>>.

War in Ukraine

Despite a movement of some States away from universal jurisdiction, a renewed push for accountability triggered by the war in Ukraine could potentially revive the precedential value of the Pinochet cases. In March 2023, following an investigation by the ICC Prosecutor into allegations of war crimes, crimes against humanity and genocide being committed in Ukraine, the ICC issued arrest warrants against Russian President Vladimir Putin and Russian Presidential Commissioner for Children's Rights Maria Lvova-Belova.¹³⁵ The warrants specifically related to alleged deportations of children from Ukraine to Russia, and the unlawful transfer of children from occupied areas of Ukraine to the Russian Federation.

In addition to the ICC warrants, in July 2023 the International Centre for the Prosecution of the Crime of Aggression against Ukraine (ICPA) began operations in the Hague, hosted by the European Union Agency for Criminal Justice Cooperation (Eurojust).¹³⁶ The creation of the ICPA is the first step towards the introduction of the Special Tribunal for the crime of aggression against Ukraine.¹³⁷ The Centre aims to be one of the driving forces behind the investigation of Russia's crime of aggression against Ukraine and to facilitate case-building for future prosecutions. There has also been activity on a national level, for example, the Federal Prosecutor in Germany has initiated investigations and created specialised units to investigate crimes being committed in Ukraine.¹³⁸ This renewed push for accountability and discussions surrounding universal jurisdiction may reignite interest in the Pinochet cases.

C. The Debate Continues: ILC Draft Articles

Finally, whilst the Pinochet case was certainly a milestone in the development of international law, the debate over the immunity of state officials accused of international crimes still continues, as highlighted by recent work of the ILC. In August 2022, the Commission adopted, on first reading, 18 draft articles (with commentaries) on *Immunity of State Officials from Foreign Criminal Jurisdiction*.¹³⁹

Chapter VI, Part Three of the Draft Articles specifically addresses the issue of immunity *ratione materiae* from foreign criminal jurisdiction.¹⁴⁰ The current position taken by the Draft Articles is that there should be exceptions to immunity *ratione materiae* from criminal jurisdiction, as set out in Draft Article 7. This Draft Article contains a list of 'crimes under

¹³⁵ International Criminal Court, 'Situation in Ukraine: ICC Judges Issue Arrest Warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova' (17 March 2023) <<https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>> accessed 1 October 2023.

¹³⁶ European Commission, 'Ukraine: International Centre for the Prosecution of Russia's Crime of Aggression against Ukraine Starts Operations' (3 July 2023) <https://neighbourhood-enlargement.ec.europa.eu/news/ukraine-international-centre-prosecution-russias-crime-aggression-against-ukraine-starts-operations-2023-07-03_en> accessed 9 October 2023.

¹³⁷ Institute for War & Peace Reporting, 'The International Centre for Prosecution for the Crime of Aggression against Ukraine' (8 August 2023) <<https://iwpr.net/global-voices/international-centre-prosecution-crime-aggression-against-ukraine>> accessed 13 October 2023.

¹³⁸ Federal Republic of Germany, 'Position of Germany on 'The Scope and Application of the Principle of Universal Jurisdiction' (12 October 2022) <https://www.un.org/en/ga/sixth/77/pdfs/statements/universal_jurisdiction/12mtg_germany.pdf>.

¹³⁹ ILC, 'Report of the International Law Commission on the Work of its Seventy-Third Session' (18 April-3 June and 4 July-5 August 2022) UN Doc A/77/10, 188-287.

¹⁴⁰ Ibid, 225.

international law’ which, if allegedly committed, would prevent the application of immunity *ratione materiae* from criminal jurisdiction to a foreign official, even if the official committed those crimes while acting in an official capacity during his or her term of office. Such crimes include genocide, crimes against humanity, war crimes, the crime of apartheid, torture and enforced disappearance.¹⁴¹

The Commission’s decision to include this article was based in part on its recognition of “a discernible trend [amongst national courts] towards limiting the applicability of immunity from jurisdiction *ratione materiae* in respect of certain types of behaviour that constitute crimes under international law”.¹⁴² The first case referenced by the Commission “in support of such a trend” is *Pinochet (No. 3)*.¹⁴³ Furthermore, the Commission appeared to justify the inclusion of Draft Article 7 in light of a need to “pursue its mandate of promoting the progressive development and codification of international law”.¹⁴⁴ While it is not clear whether States agree with the suggestion that there has been a ‘trend’ towards limiting immunity *ratione materiae*, some may see the Pinochet case as the tinderbox behind this legal evolution.¹⁴⁵

The response of States to the Draft Articles has been mixed. According to Sir Michael Wood KC, the immunity of State officials is “one of the most controversial topics taken up by the Commission”, which is only reinforced by the fact that “there is no general agreement on what the existing law is or on what the law should be”.¹⁴⁶ As a result, controversy over Draft Article 7 had the effect of overshadowing the adoption of the first reading text.¹⁴⁷ Those ILC members who were critical of Draft Article 7 took the view that the Commission was conducting a “normative policy” exercise that bore no relation to either the codification or progressive development of international law.¹⁴⁸ For such members, the draft article was seen as a proposal for “new law” that could not be considered as *lex lata* nor a desirable progressive development of international law.¹⁴⁹

In sum, the story of Pinochet and his transition from Head of State to Defendant is a microcosm of the international community’s efforts over the decades to secure accountability for the crimes that most shock humanity’s conscience. The pendulum swings between efforts to stamp out impunity, facilitated by universal jurisdiction and progressive development of the law, and a formalist, state-centric approach that limits such prosecutions to international courts with circumscribed jurisdiction that are reliant on state cooperation. It is not clear how the story will conclude, but we hold out a glimmer of hope for a Pinochet precedent to take prevail.

¹⁴¹ ILC, ‘Report of the International Law Commission on the Work of its Seventy-Third Session’ (n 137), 236.

¹⁴² *Ibid*, 232.

¹⁴³ *Ibid*, 232 (see footnote 1012).

¹⁴⁴ *Ibid*, 234.

¹⁴⁵ For further context, see Michael Wood’s suggestion that even after adoption on first reading of the Draft Articles in 2022, Draft Article 7 ‘remains highly contested within the Commission’: Michael Wood, ‘The ILC’S First Reading Draft Articles on ‘Immunity of State Officials from Foreign Criminal Jurisdiction’ (2023) Max Planck Yearbook of United Nations Law Online <https://doi.org/10.1163/18757413_02601009>.

¹⁴⁶ Michael Wood, ‘The ILC’S First Reading Draft Articles on ‘Immunity of State Officials from Foreign Criminal Jurisdiction’ (2023) 3 Max Planck Yearbook of United Nations Law Online <https://doi.org/10.1163/18757413_02601009> accessed 14 October 2023.

¹⁴⁷ *Ibid*.

¹⁴⁸ ILC, ‘Report of the International Law Commission on the Work of its Seventy-Third Session’ (n 137), 235.

¹⁴⁹ *Ibid*, 236.

